

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA INC., et al.,

Defendant.

MOTOROLA MOBILITY, LLC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

No. C10-1823-JLR

REDACTED

MICROSOFT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT OF
BREACH OF CONTRACT AND
SUMMARY JUDGMENT ON
MOTOROLA'S THIRD, FOURTH,
FIFTH, SEVENTH, EIGHTH, AND
NINTH AFFIRMATIVE DEFENSES
AND SECOND COUNTERCLAIM

Noted: July 31, 2013 at 10:00 AM

ORAL ARGUMENT REQUESTED

MICROSOFT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT OF BREACH OF
CONTRACT

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I. INTRODUCTION

As a pretext for suing Microsoft for infringement of patents Motorola had committed to license to all on RAND terms and conditions, Motorola sent two demand letters to Microsoft in October 2010. Motorola's demands, made with 20-day ultimatums, were so over-reaching that no rational company could ever have accepted them or even viewed them as legitimate offers. Having dispensed with the formality of an "offer," once the 20 days were up Motorola filed lawsuits against Microsoft on a subset of Motorola's declared standard-essential patents, seeking injunctions aimed at giving Motorola enormous leverage in other patent disputes with Microsoft. This is the essence of hold up, and a flagrant breach of the RAND licensing commitments made by Motorola to the pertinent standard setting organizations.

As the Court's Findings of Fact and Conclusions of Law confirm, the demands Motorola made in October 2010 were astronomically higher than an actual RAND royalty for Motorola's standard-essential patents. Instead of granting a license on RAND terms, Motorola breached its RAND licensing commitments. Motorola's conduct forced Microsoft to defend itself against litigation that never should have been brought, and to incur legal fees and significant business expenditures to protect Microsoft's standard-compliant products from being improperly shut out of the market.

Motorola's conduct (the demand letters, suing and seeking injunctions on standard-essential patents, discriminating against Microsoft's supplier Marvell) has breached its RAND commitments on multiple grounds, but this motion is directed at two specific bases of breach most appropriate for summary judgment:

- Motorola breached the duty of good faith and fair dealing by engaging in commercially unreasonable conduct.
- Motorola breached the duty of good faith and fair dealing by engaging in conduct that frustrated the purpose of its RAND licensing commitments.

1 In March 2012, Microsoft moved for summary judgment that Motorola had breached
 2 its RAND licensing commitments. (Dkt. No. 236.) The Court denied the motion because it
 3 then lacked a true RAND royalty to compare to Motorola's demands. (Dkt. 335 at 25–26.)
 4 Now that the Court, with the agreement of the parties, has determined the RAND royalties due
 5 from Microsoft for a license to Motorola's declared standard essential patents, it is apparent
 6 that Motorola's October 2010 demands were so unreasonable (certainly blatantly
 7 unreasonable) as to breach the duty of good faith and fair dealing.

8 The remaining issues that caused the Court to hesitate to grant Microsoft summary
 9 judgment previously have likewise been resolved. First, the Court found that “a determination
 10 of the relevance of Motorola's prior license agreements” was “inherently fact intensive” (Dkt.
 11 No. 335 at 26), but the Court completed that inquiry in the RAND royalty trial and found those
 12 agreements irrelevant (Dkt. No. 673, April 19, 2013 Findings of Fact and Conclusions of Law
 13 (“FFCL”) ¶¶ 420, 435, 443, 445, 454). Second, the Court perceived fact issues in “Microsoft's
 14 assertion that Motorola's 802.11 and H.264 Standard essential patent portfolios cover only a
 15 minimal part of the technology involved in the 802.11 and H.264 Standards” (Dkt. No. 335 at
 16 27), but the Court made precisely that finding following the RAND royalty trial (FFCL
 17 ¶¶ 289, 299, 533, 575, 576).

18 Finally, the Court noted an open question as to whether Motorola's demand letters
 19 “were sent in bad faith.” (Dkt. No. 335 at 27.) As explained in Microsoft's July 1 brief
 20 concerning the duty of good faith and fair dealing, while a finding that Motorola acted in bad
 21 faith is *sufficient* to establish a breach of the duty, it is not *necessary* to establish breach,
 22 because either (1) objectively commercially unreasonable (or blatantly unreasonable) conduct,
 23 or (2) conduct that frustrates the purposes of the contract, also gives rise to liability for breach.
 24 (Dkt. No. 715 at 5–11.) These two grounds are the subject of Microsoft's present motion, and
 25 no material issues of fact remain for trial as to either. Moreover, even if Motorola's lack of
 26

1 good faith were relevant, Motorola could not oppose summary judgment by claiming that
 2 Motorola sent its demand letters in good faith, because Motorola repeatedly asserted privilege
 3 to block discovery into the basis for its offers to Microsoft.¹ Consistent with the Court's prior
 4 ruling, given Motorola's privilege objections, "[i]t would be unfair for Motorola to offer
 5 testimony of its choice" on the issue of any good faith basis for its demands, having "denied
 6 Microsoft the opportunity to examine the testimony in detail." Wion Decl.² Ex. 4 (October 29,
 7 2012 Pretrial Conf. Tr.) 22:10–12.

8 Either of the two bases set forth above is sufficient to establish Motorola's liability for
 9 breach of its RAND licensing commitments. Once the Court has granted summary judgment
 10 of liability, all that remains is to ascertain damages. If the parties cannot stipulate to the
 11 amount of damages, that issues can be resolved by a short jury trial.

12 **II. STATEMENT OF FACTS**

13 **A. Motorola's Contractual RAND Licensing Commitments.**

14 The Court has already ruled that Motorola entered into contracts with the IEEE and
 15 ITU standard setting organizations ("SSOs") through its RAND licensing commitments, and
 16 that Microsoft is a third party beneficiary of those contracts, entitled to enforce them. (FFCL
 17 at 5.) The terms of Motorola's contractual commitments come from two sources—the letters
 18

19 ¹ For example, Motorola's Kirk Dailey was asked, [REDACTED]
 20 [REDACTED] and was
 21 instructed by counsel not to answer on the basis of attorney-client privilege. Wion Decl. Ex. 1 (Dailey 7/12/2012
 22 Dep.) at 69. Dailey was also asked [REDACTED]
 23 [REDACTED] Dailey referenced [REDACTED]
 24 [REDACTED] but refused to state [REDACTED] again asserting privilege. *Id.* at 71–72. Brian
 25 Blasius, Motorola's 30(b)(6) designee concerning its offers to Microsoft, refused to answer [REDACTED]
 26 [REDACTED]
 again asserting privilege. Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) at 39–41. Motorola's privilege log for
 October 2010 also includes documents [REDACTED] See Wion Decl. Ex. 3,
 (Motorola's Second Supplemental Log of Withheld Documents) (*e.g.*, entries 18240, 18248–18259, 18266,
 18270, 18273).

² Exhibits are attached to the Declaration of Christopher Wion in Support of Microsoft's Motion for Partial
 Summary Judgment of Breach of Contract ("Wion Decl.") filed concurrently with this motion. Exhibits
 previously admitted at trial are designed with "Trial Ex."

1 of assurance and declarations that Motorola submitted to these SSOs; and relevant language
 2 from the SSOs' policies (Dkt. No. 335, June 6, 2012 Summary Judgment Order at 13 n. 6)—
 3 with their interpretation guided by the purpose of the RAND licensing commitment.

4 Motorola participated in the standardization process for the 802.11 wireless networking
 5 standard, governed by the IEEE and its Intellectual Property Rights Policy. (FFCL ¶¶ 37–48.)
 6 The IEEE policy provides that if the IEEE becomes aware of a potentially essential patent, it
 7 will request the patent holder submit a Letter of Assurance committing either that (a) it will not
 8 enforce the patent or (b) “a license for compliant implementation of the standard will be made
 9 available to an unrestricted number of applicants on a worldwide basis without compensation
 10 or under [RAND terms].” Trial Ex. 1568 § 6.2. In accordance with the IEEE's policy,
 11 Motorola submitted numerous Letters of Assurance to the IEEE concerning any Motorola
 12 patents essential to the 802.11 Standard. (FFCL ¶ 44.) Similarly, Motorola participated in the
 13 standardization process for the H.264 video coding standard, governed by the ITU and its
 14 Common Patent Policy. (FFCL ¶¶ 26–36.) In accordance with the ITU Patent Policy,
 15 Motorola submitted numerous declarations to the ITU concerning any Motorola patents
 16 essential to the H.264 Standard. (FFCL ¶ 36.)

17 The general terms of Motorola's ITU and IEEE contractual commitments are similar:
 18 they require Motorola to grant licenses to its standard essential patents to any implementer on
 19 reasonable and non-discriminatory terms. (FFCL ¶¶ 36, 44) The relevant policies of the
 20 SSOs, and the specific language of Motorola's multiple declarations and letters of assurance
 21 place additional contractual constraints on Motorola. At the time Motorola submitted its initial
 22 Letters of Assurance, the IEEE required that Motorola submit “a draft of [its] license that
 23 assures that the technology will be made available *at nominal competitive costs* to all who seek
 24 to use it for compliance with” the 802.11 standard. Trial Ex. 1130 at MS-
 25 MOTO_1823_00005246490 (emphasis added); FFCL ¶¶ 47–48. The “sole objective” of the
 26

1 ITU's Patent Policy is to ensure that any patent essential to the H.264 standard "be accessible
 2 to everybody without undue constraints." Trial Ex. 1575 at MOTM_WASH1823_0602815;
 3 FFCL ¶ 27. Pursuant to this policy, Motorola declared that it was "prepared to grant a license
 4 to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on
 5 reasonable terms and conditions to make, use and sell implementations of the above
 6 document." Trial Ex. 2838 at MOTOM_WASH1823_0000036.

7 A core purpose of the RAND licensing commitment is to address the problems of hold-
 8 up and royalty stacking that would otherwise inhibit widespread adoption of the standard.
 9 (FFCL ¶¶ 51, 57, 60, 66, 538.) See Wion Decl. Ex. 5 (Leonard Dep.) 20:19–21:18. As to
 10 hold-up, Motorola's RAND licensing commitments limit any royalty it demands to the
 11 economic value of any of Motorola's patented technology as present in the standard, not to any
 12 of the value of the standard itself. (FFCL ¶¶ 55, 71, 74.) As to stacking, Motorola's RAND
 13 licensing commitments limit any royalty it demands by requiring that the aggregate royalties
 14 associated with a given standard remain reasonable. (FFCL ¶¶ 66, 72.)

15 **B. Motorola's October 2010 Demand Letters.**

16 In October 2010, Motorola sent two letters to Microsoft demanding billions of dollars
 17 in annual royalties for two sets of patents Motorola claimed were essential to the 802.11 and
 18 H.264 industry standards. Motorola's letters demanded a 2.25% royalty on the price of end
 19 products—in the case of 802.11, on the sale price of Xbox and Windows phones, and in the
 20 case of H.264, on the sale prices of Xbox and of laptops and PCs running Microsoft Windows.
 21 Trial Exs. 1, 2. For Motorola's H.264 standard-essential patents, that demand translates into a
 22 royalty ranging from \$11.25 to \$22.50 for Windows laptops (sold by Microsoft's
 23 manufacturer-customers) for \$500 to \$1000, and from \$4.50 to \$9 for Xbox consoles priced
 24 from \$200 to \$400. For Motorola's 802.11 standard-essential patents, that demand translates
 25 to a royalty of \$4.50 to \$9 for Xbox consoles priced from \$200 to \$400. Based on publicly-
 26

1 available projections of the number of Windows-based computers sold in 2010, Motorola was
 2 demanding roughly \$4 billion per year from Microsoft for a license to the H.264 patents alone.
 3 Wion Decl. Ex. 5 (Leonard Dep.) 191:1–199:22.

4 At the trial last November, Motorola advanced arguments that the 2.25% royalty
 5 demanded of Microsoft was somehow justified by prior license agreements relating to cellular
 6 essential patents and other portfolios. (FFCL at 130–31.) The Court rejected these claims.
 7 While Motorola had included some of its 802.11 or H.264 patents in other, broader license
 8 agreements that included Motorola’s cellular standard-essential patents, or other non-essential
 9 Motorola patents, the Court determined that those licenses are not comparable to a license to
 10 the H.264 or 802.11 patents alone, and *do not* provide support for a 2.25% royalty demand for
 11 such a license. (FFCL ¶¶ 420, 425, 440, 445, 451.) As Motorola’s latest economic expert,
 12 Gregory Leonard, concedes, Motorola had never licensed its portfolios of H.264 or 802.11
 13 standard-essential patents on a standalone basis, and [REDACTED]
 14 [REDACTED] Wion Decl. Ex. 6 (Leonard Opening
 15 Rpt.) ¶ 66); Wion Decl. Ex. 5 (Leonard Dep.) 155:15–20. Moreover, Motorola had never
 16 previously demanded [REDACTED]
 17 [REDACTED] as it did of Microsoft in its H.264 demand. Wion Decl. Ex. 2
 18 (Blasius 30(b)(6) Dep.) 130:23–131:6.

19 **C. Motorola’s Pursuit of Lawsuits On Its Standard-Essential Patents.**

20 Motorola’s letters were ultimatums: the offers were open for only 20 days, and
 21 Microsoft was asked only to confirm that it “accepted” Motorola’s terms. Trial Exs. 1, 2;
 22 Wion Decl. Ex. 7 (Dailey ITC Tr.) 2500:1–2501:7 (agreeing that [REDACTED]
 23 [REDACTED]
 24 [REDACTED]). As the letters were facially a prelude to lawsuits on Motorola’s standard-
 25 essential patents, Microsoft filed this suit on the twentieth day after the first letter was sent,
 26

1 alleging that that Motorola had breached its contractual commitments to license its standard-
2 essential patents on RAND terms. Microsoft's complaint sought a declaration that Microsoft
3 was entitled to a license on RAND terms, asked the Court to determine the RAND terms for
4 such a license, and requested an injunction barring Motorola from engaging in further conduct
5 inconsistent with its RAND licensing obligations. (See Dkt. No. 1, Complaint at ¶ 9, Prayer
6 for Relief.)

7 On the twenty-first day (November 10, 2010), consistent with the ultimatum in the
8 October 21 letter and obviously implementing a preexisting plan, Motorola filed two patent
9 infringement actions against Microsoft in the Western District of Wisconsin, Case No. 3:10-
10 CV-699 (the "699 Action") and Case No. 3:10-CV-700 (the "700 Action"). Less than two
11 weeks later, Motorola filed a complaint for patent infringement against Microsoft in the
12 International Trade Commission, leading to the investigation designated *In the Matter of*
13 *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*
14 (ITC Case No. 337-TA-752) (the "ITC Action"). In each of the 699 Action, the 700 Action,
15 and the ITC Action, Motorola alleged infringement of patents it asserted to be essential to the
16 802.11 and/or H.264 standards, and sought to enjoin Microsoft from implementing those
17 standards. (Dkt. No. 53, Amended Compl. ¶¶ 74–77; Dkt. No. 68, Ans. to Amended Compl.
18 ¶¶ 74–77.)

19 Microsoft amended its complaint on February 23, 2011, alleging that Motorola's filing
20 of lawsuits and pursuit of injunctions against Microsoft on standard-essential patents, including
21 in the 699, 700, and ITC Actions, further breached Motorola's RAND licensing obligations.
22 (Dkt. No. 53 ¶ 85.) Unfazed by this, and apparently unsatisfied with the pressure on Microsoft
23 imposed by the U.S. actions alone, on July 6 and 7, 2011, Motorola again sued Microsoft, this
24 time in Germany, asserting two of the declared standard-essential H.264 patents that were the
25 subject of its October 2010 letter. (Dkt. No. 318, May 14, 2012 Order at 18–19.) Motorola
26

sought an injunction that would exclude Microsoft's standard-compliant products (including the Windows operating system and the Xbox video game console) from the German market. (*Id.* at 21–22.)

Motorola pursued these legal actions, including injunctions, relentlessly, despite knowing that it could secure a RAND royalty in the contract proceedings pending in this Court. Nonetheless, Motorola proceeded with the ITC hearing in January 2012, and pressed forward with its German infringement case. When the German court announced on February 7, 2012 that it would rule on April 17, 2012, Microsoft again sought to forestall an injunction that was unnecessary to Motorola's obtaining a RAND royalty. Microsoft's counsel wrote to Motorola's counsel on March 14, asking that Motorola agree not to enforce any German injunction and offering to post a \$300 million bond (far in excess of any conceivable compensation due on two German H.264 patents). (*See* Dkt. No. 211 Exs. 2, 3.) In the face of this, Motorola still proceeded until enjoined from doing so by this Court.

D. The RAND Royalty For Motorola's Standard-Essential Patents.

In November 2012, the Court held a bench trial to determine a RAND royalty for Motorola's H.264 and 802.11 standard-essential patents. The Court determined that the RAND royalty for Motorola's H.264 patents is 0.555 cents per unit. (FFCL ¶ 537.) The Court also determined a RAND range for H.264, with a lower bound of 0.555 cents per unit (FFCL at 8), and an upper bound of 16.389 cents per unit derived from the highest number floated for discussion purposes during the formation of the MPEG LA AVC pool—a rate that no one agreed to but that was merely a straw man used to prompt discussion (FFCL ¶ 543–45). The Court determined that the RAND royalty for Motorola's 802.11 standard-essential patents is 3.471 cents per unit. (FFCL ¶ 621.) The Court also determined a RAND range for 802.11, with a lower bound of 0.8 cents per unit, based on the evaluation that InteCap provided Motorola (FFCL ¶¶ 625–27), and an upper bound of 19.5 cents per unit, derived as a multiple

1 of the high end of a RAND royalty for Motorola's 802.11 patents offered by Microsoft at trial
 2 (FFCL ¶¶ 622–24).

3 **III. LEGAL STANDARD**

4 Summary judgment is appropriate if the evidence, when viewed in the light most
 5 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to any
 6 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);
 7 *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of L.A.*, 477 F.3d 652,
 8 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine
 9 issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477
 10 U.S. at 323.

11 A claim for breach of contract requires a valid contract, a breach of a duty arising under
 12 that contract, and resulting harm. *N.W. Indep. Forest Mfrs v. Dep't of Labor and Indust.*, 899
 13 P.2d 6, 9 (Wash. App. 1995). The Court has already repeatedly held that Motorola's RAND
 14 licensing commitments are valid, enforceable contracts. The Court has also held that
 15 “Motorola must grant Microsoft a RAND license” (Dkt. No. 465, Oct. 10, 2012 Order at 14),
 16 yet Motorola to this day has refused to provide one—the lack of that license alone is sufficient
 17 harm to establish breach. Moreover, the Court has also held that engaging in hold up in
 18 violation of RAND commitments causes harm (FFCL ¶¶ 55–58), and as set out more fully
 19 below, both Motorola's October 2010 letters and its lawsuits and pursuit of injunctions were
 20 part of an impermissible hold-up strategy. Motorola's conduct placed Microsoft at substantial
 21 risk of having its products enjoined in both the United States and Germany, forcing Microsoft
 22 to incur significant legal expenses opposing Motorola's actions, which were brought in breach
 23 of Motorola's RAND licensing commitments. If Motorola had enforced its German injunction,
 24 Microsoft could not have distributed its H.264-compliant products (including Xbox and
 25 Windows) from its German facility, meaning Motorola's pursuit of its German injunction left
 26

1 Microsoft with no choice but to relocate its primary distribution facility for Europe, the Middle
 2 East, and Africa (“EMEA”), incurring significant additional costs. While Motorola may
 3 contest the amount of monetary damages Microsoft can recover, the harms outlined above are
 4 sufficient to establish liability for breach and trigger Microsoft’s right to relief. *See Merrell v.*
 5 *Renier*, No. C06-404-JLR, 2006 WL 3337368, at *5–6 (W.D. Wash. Nov. 16, 2006)
 6 (Washington law) (collecting cases and holding that “[a] plaintiff need not prove financial loss
 7 to prevail in a suit to obtain specific enforcement of a contract”).

8 Motorola’s conduct can be analyzed with reference to specific terms of its contractual
 9 RAND licensing commitments, but as with all contracts, Motorola’s RAND licensing
 10 commitments also include an inherent duty of good faith and fair dealing imposing additional
 11 constraints on Motorola. *See* Dkt. 335 at 25; *Badgett v. Sec. State Bank*, 807 P.2d 356, 360
 12 (Wash. 1991); *Frank Coluccio Construction Co., Inc. v. King County*, 150 P.3d 1147, 1154
 13 (Wash. App. 2007). As the Court already found, and as Motorola conceded, a blatantly
 14 unreasonable opening offer to license its standard-essential patents breaches its RAND
 15 licensing commitments. (Dkt. 335 at 25; Dkt. 188 at 15 (“To wit, during the February 13, 2012
 16 status conference, counsel for Motorola agreed that blatantly unreasonable offers would violate
 17 its RAND obligations under the policies.”).)³

18 Washington courts have looked to the definition of good faith and fair dealing set forth
 19 in the Restatement (Second) of Contracts § 205. *See Edmonson v. Popchoi*, 256 P.3d 1223,
 20 1227 (Wash. 2011). The Restatement provides:

21 Good faith performance or enforcement of a contract emphasizes faithfulness to
 22 an agreed common purpose and consistency with the justified expectations of

23 ³ Defendant Motorola Solutions agrees that an SEP holder breaches its RAND commitments by making
 24 blatantly unreasonable licensing demands: Motorola Solutions brought a breach of contract claim against a holder
 25 of patents allegedly essential to the 802.11 standard based, in part, on the patent holder’s pursuit of “a licensing
 26 program that is blatantly unreasonable on its face, including blatantly unreasonable offers and other conduct in
 violation of good faith and fair dealing inherent in all contracts.” Wion Decl. Ex. 8, Plaintiffs’ Amended
 Complaint, Dkt. No. 431, *In re Innovatio IP Ventures, LLC, Patent Litig.*, Case No. 1:11-cv-9308 (N.D. Ill. Oct.
 1, 2012) ¶ 312.

the other party; it excludes a variety of types of conduct characterized as involving “bad faith” because they violate community standards of decency, fairness or reasonableness.

§ 205. Although no exhaustive catalogue of wrongful acts has been compiled, traditional examples of prohibited conduct include “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”

Restatement § 205 cmt. d.

In particular, the duty of good faith and fair dealing requires that a party given discretion by a contract exercise that discretion reasonably. *See Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006) (Washington law); Dkt. No. 715 at 7–8. Even if a party acts in a way that might, in the abstract, seem commercially reasonable, the party would still breach the duty of good faith and fair dealing if the action frustrates the purpose of the contract. *See Frank Coluccio*, 150 P.3d at 1154–55 (affirming finding of breach of duty of good faith and fair dealing where defendant’s conduct was contrary to the purpose of the contract); Dkt. No. 715 at 8–11.

A showing of subjective bad faith is not required. *See Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) (Washington law) (“That a party can breach the duty of good faith and fair dealing by acting dishonestly or unlawfully does not mean that dishonesty or an unlawful purpose is a necessary predicate to proving bad faith.”); Restatement § 205 cmt. d (noting that “[s]ubterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified” and that “fair dealing may require more than honesty.”); Dkt. No. 715 at 5–6.





As set forth in Microsoft’s July 1, 2013 brief concerning the legal standard for determining a patent holder’s compliance with the duty of good faith and fair dealing in the context of RAND licensing, the duty requires that Motorola engage in objectively commercially reasonable (and not blatantly unreasonable) conduct with respect to the licensing

of its standard-essential patents. (*See* Dkt. 715 at 7–8.) The duty of good faith and fair dealing also bars Motorola from engaging in conduct that frustrates the purpose of the RAND licensing commitment. (*See id.* at 8–11.)

IV. ARGUMENT

A. Motorola Breached The Duty Of Good Faith And Fair Dealing By Engaging In Commercially Unreasonable (And Blatantly Unreasonable) Conduct.

Motorola’s H.264 royalty demand of 2.25% on the price of end products ranged from \$4.50 per unit for the cheapest Xbox, to \$11.25 per unit or higher for computers running Windows—but the RAND royalty is only 0.555 cents per unit, and the upper bound of the RAND royalty range determined by the Court is 16.389 cents. Motorola’s 802.11 royalty demand of 2.25% equates to \$4.50 per unit or higher for the Xbox, but the RAND royalty is only 3.471 cents per unit, with the upper bound of the RAND royalty range at 19.5 cents. If

	Motorola’s October 2010 Demands	Court-Determined RAND Royalty
H.264	 <p>\$11.25 per unit</p>	 <p>0.555 ¢ per unit</p>
802.11	 <p>\$4.50 per unit</p>	 <p>3.471 ¢ per unit</p>

these offers are not “blatantly unreasonable” (which would violate the RAND licensing commitment), it is difficult to conceive of any offer that could be so characterized.

1 Given the RAND royalty and royalty range, no reasonable juror could conclude that
 2 Motorola had made a commercially reasonable offer—Motorola’s demand was not just high, it
 3 was wildly excessive. While a seller may be willing to come down from an opening offer, that
 4 does *not* mean that any offer is commercially reasonable just because negotiation might follow.
 5 No reasonable juror could find a sticker price of \$54 million for a standard Ford Taurus
 6 commercially reasonable, or a real estate listing of \$800 million for an ordinary 3-bedroom
 7 house in Seattle commercially reasonable—and those demands exceed the true value of those
 8 goods⁴ by the same factor as Motorola’s H.264 demand did the actual RAND royalty.⁵

9 Even ignoring the yawning chasm that separates Motorola’s demands from the RAND
 10 royalty, the record evidence otherwise confirms Motorola’s demands were completely
 11 unfounded and commercially unreasonable. First, nothing in Motorola’s licensing history
 12 supports the scale of its demands. [REDACTED]

13 [REDACTED] (See FFCL
 14 ¶¶ 418–19, 425–434; Wion Ex. 2 (Blasius 30(b)(6) Dep. Tr.) 127:12–128:18.) After the
 15 November trial, the Court concluded that none of the agreements Motorola identified
 16 supported the royalty demanded of Microsoft for H.264 and 802.11 standard-essential patents
 17 (FFCL ¶¶ 420, 425, 440, 445, 451), and those licenses did “little to show an established royalty
 18 rate commensurate with the amount of royalties Motorola seeks” (FFCL ¶ 454).⁶ In a
 19

20 ⁴ A Ford Taurus has a suggested retail price of \$26,700. See <http://www.ford.com/cars/taurus/> (visited June 21,
 21 2013). Median home prices in Seattle are currently above \$400,000. See
 22 http://seattletimes.com/html/business/technology/2020711424_homesalesmarchxml.html (visited June 21, 2013).

23 ⁵ If only Motorola’s 802.11 offer were considered, the opening demand for the Taurus would be \$3.4 million,
 24 and the house would be listed at a mere \$51.8 million.

25 ⁶ The Court’s analysis was with reference to the royalty Motorola advocated at trial, but this was the same
 26 2.25% of end-product prices that Motorola demanded in its letters. (FFCL at 130–31.) The sole difference is that
 Motorola applied its H.264 royalty to Microsoft Windows at trial, rather than to computers running Windows—
 but the Court’s rejection of Motorola’s supposedly comparable licenses had nothing to do with this issue. (See
 FFCL ¶¶ 407–54.) In any event, because the agreements Motorola relied on could not support its marginally-
 reduced demand at trial, they certainly could not demonstrate that Motorola’s *higher* October 2010 demands were
 objectively commercially reasonable.

1 remarkable reversal of Motorola's position at the RAND royalty trial, Motorola's expert
2 Leonard now admits

3 As of October 2010, Motorola's 802.11 and H.264 SEP portfolios had not been
4 separately licensed. [REDACTED]

5 [REDACTED] *It is difficult or impossible to break out a separate*
6 *royalty rate for the 802.11 and H.264 SEP portfolios in these agreements,* and
7 they do not cover software. Accordingly, Motorola had no past experience on
which it could draw when it attempted to negotiate a RAND license with
Microsoft.

8 Ex. 6 (Leonard Opening Rep.) ¶ 66 (emphasis added).⁷ Motorola has now conceded,
9 consistent with the Court's findings, that nothing in its licensing history indicates that
10 demanding 2.25% on the price of end products for its 802.11 and H.264 patents would be
11 reasonable.

12 Second, the limited importance of Motorola's 802.11 and H.264 patents confirms that
13 Motorola's demands were commercially unreasonable. Each of the Motorola 802.11 patents
14 presented at the November 2012 trial "provides very minimal technical contribution to the
15 identified portions of the 802.11 Standard," and as the Court observed "Motorola did not
16 provide the inventive technology in any area of the 802.11 Standard, but instead built upon
17 already existing technology." (FFCL ¶ 575.) Motorola's patents "constitute only a sliver of
18 the overall technology incorporated into the 802.11 Standard" (FFCL ¶ 576) and cannot
19 possibly justify a demand for a 2.25% royalty on the entire value of the Xbox, which does not
20

21 ⁷ Just six months ago, Motorola told the Court just the opposite in its Post-Trial Brief:

22 Microsoft's experts argued that [REDACTED] licenses are not appropriate benchmarks because,
23 under Motorola's "no stacking" policy, it is difficult to apportion the royalties among the various
licensed portfolios. But a closer examination of these agreements refutes that position. [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 (Dkt. No. 620, Defs' Post-Trial Br. at 7.)

1 even need to use the 802.11 standard (FFCL ¶ 349). Similarly, Motorola’s H.264 patents are
 2 largely directed toward interlaced video, a technology the Court found “not overly important”
 3 to current products (¶ 532), and overall Motorola’s portfolio is, at most, of “only minor
 4 importance” to products like Windows and Xbox (FFCL ¶¶ 289, 299). As with 802.11,
 5 Motorola’s H.264 patents “only constitute[] a sliver of the overall technology incorporated
 6 into the H.264 Standard.” (FFCL ¶ 533.) The marginal value of Motorola’s H.264 patents
 7 cannot possibly justify a demand for a 2.25% of the entire value of a computer running
 8 Windows.

9 The number of owners of 802.11 and H.264 essential patents who had submitted letters
 10 of assurance to the IEEE and ITU was publicly available [REDACTED]

11 [REDACTED] Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) 73:10–75:12, 83:12–
 12 84:2. [REDACTED]

13 [REDACTED] *Id.* at 81:3–
 14 16, 84:19–85:5. [REDACTED]

15 [REDACTED]
 16 [REDACTED] *Id.* at 82:7–12, 85:6–86:2.

17 [REDACTED]
 18 [REDACTED] *Id.* at 91:22–93:22.

19 Motorola had participated in the formation of the MPEG-LA H.264 pool and joined in press
 20 releases characterizing the pool rates as reasonable. (FFCL ¶¶ 470, 478–79, 481.) Whether the
 21 RAND royalty is ultimately the pool rate or slightly higher, as the Court found, the pool
 22 royalty (and Motorola’s prior endorsement of it) demonstrates that the Motorola offer was not
 23 commercially reasonable.

24 There are numerous additional indications that Motorola’s 802.11 demand was
 25 commercially unreasonable. The royalty Motorola demanded would exceed the cost of the
 26

chipset that provides the 802.11 functionality in Xbox, which costs only a few dollars. (FFCL ¶ 581.) The Court found that royalty rates of 1% of chip price (*not* end product price) represent a customary high ceiling for licensing in the semiconductor industry for products like Marvell's. (FFCL ¶¶ 585–90.) Motorola itself commissioned a study by InteCap to value its 802.11 portfolio which suggested that even lower rates of 0.5% of chip price would be appropriate. (FFCL ¶¶ 591–607.) The Court found the InteCap study indicative of commercially reasonable conduct (evidence of what is “customary in the particular business” under a modified *Georgia-Pacific* factor 12), as it reflected “an effort by a company in the business of licensing (RAND) patents to fashion a RAND royalty rate.” (FFCL ¶¶ 589, 606.) Motorola's 802.11 demand on the Xbox was \$4.50; that the amount suggested by InteCap for the chip alone was 2 cents⁸ confirms Motorola's demand was commercially unreasonable.

As to Motorola's H.264 demand, by demanding royalties on the prices of its prospective licensees' *customers'* products, [REDACTED] Motorola's H.264 letter explicitly demanded a 2.25% royalty “calculated based on the price of the end product . . . [e.g.] each PC/laptop, each smartphone . . . and not on component software.” Trial Ex. 2.

[REDACTED] Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) 130:23–131:6, [REDACTED]

[REDACTED] Wion Decl. Ex. 7 (Dailey ITC Tr.) 2552:8–10 [REDACTED]

[REDACTED]; Wion Decl. Ex. 9 [REDACTED]

[REDACTED] at MOTM_WASH1823_0019341 [REDACTED]

⁸ InteCap also suggested a 0.1% royalty on devices like game consoles that included 802.11 capability. (FFCL ¶ 596.) While it would not be commercially reasonable to charge a higher royalty on an end user device than on the chip that provides the patented technology (as InteCap suggested), even assuming it could be, the 0.1% royalty on a \$200 Xbox would amount to 20 cents, which also would confirm that Motorola's \$4.50 demand is commercially unreasonable.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] Wion Decl. Ex. 6 (Leonard Dep.) 70:21–72:23.

4 Motorola may argue that it did not know at the time the demand letters were sent that
 5 the royalties demanded were exorbitant and unjustified and that knowledge of that could only
 6 be acquired by examining the information that was before the Court at the November trial. But
 7 this is hardly a cognizable defense. In the first place, a breach does not depend on Motorola's
 8 subjective intent and knowledge—as explained above, commercially unreasonable conduct, or
 9 conduct that frustrates the purposes of the RAND licensing commitment, is sufficient. Second,
 10 even based solely on what the Court already heard in the November trial, more than enough
 11 information was within the corporate knowledge of Motorola to show that the demands were
 12 blatantly unreasonable (including the Intecap study, the scope and nature of its own
 13 contributions to the standards, the pool rates, [REDACTED] and more).

14 Motorola will also likely argue that it was reasonable to pick 2.25% because it lacked
 15 complete information on how the patents were used in Microsoft products. This, too, is a red
 16 herring. [REDACTED]

17 [REDACTED] Wion Decl. Ex. 10 (Taylor Dep.) 90:20–91:25
 18 (“[REDACTED]”), 158:3–160:4 [REDACTED]
 19 [REDACTED]).

20 Moreover, the use of the standards in Microsoft products was facially apparent: Xbox was
 21 known to be a game console, with 802.11 needed only as an alternative means of connecting to
 22 the Internet; and Windows is a computer operating system, with the ability to display H.264
 23 video being only one of thousands of features. While more information about the Microsoft
 24 products might have been needed to arrive at a precise RAND royalty, as set by the Court, that
 25 was plainly not necessary to ascertain that the demanded royalties were not commercially
 26

reasonable. Finally, the argument that all of the information adduced at trial was necessary for Motorola to understand that the demands were outrageous is demonstrably false—even when possessed of all of this information, Motorola continued to urge a 2.25% royalty at trial.

No finder of fact could reasonably conclude that Motorola’s demands as to either standard were anything but commercially unreasonable. Accordingly, Microsoft is entitled to summary judgment that Motorola’s October 21, 2010 802.11 letter and October 29, 2010 H.264 letter breached the duty of good faith and fair dealing because Motorola’s demands were not objectively commercially reasonable (indeed, they were blatantly unreasonable).

B. Motorola Breached The Duty Of Good Faith And Fair Dealing By Engaging In Conduct That Frustrated The Purpose Of Its RAND Licensing Commitments.

The Court found that two key purposes of the RAND licensing commitment are prevention of hold up and avoidance of stacking problems. (FFCL ¶¶ 60, 66.) The undisputed facts show that Motorola’s demands violated the duty of good faith and fair dealing by frustrating both purposes.

First, Motorola’s demands created “significant stacking concerns,” as the Court has already recognized.⁹ (FFCL ¶¶ 456, 459.) At least 52 entities own H.264 SEPs (FFCL ¶ 459), and their making demands like Motorola’s (2.25% of the end price of standard-compliant products) would lead to an aggregate royalty to implement the H.264 standard exceeding the prices of standard-compliant products. At least 92 entities own 802.11 standard-essential patents (FFCL ¶ 456); if made by even half of those entities, demands like Motorola’s would lead to an aggregate royalty that exceeded the product price. Because Motorola’s 802.11 patents provide “only minimal contribution to the 802.11 Standard” (FFCL ¶ 457), and because “Motorola’s H.264 SEP portfolio relates almost entirely to interlaced video—a functionality

⁹ See note 6, *supra*. The stacking problem is even worse for Motorola’s October 2010 H.264 demand, because it sought to attach its royalty to computers running Windows—meaning that Motorola’s 2.25% demand of the price of the computer for its meager portion of H.264 alone is weighed against not only all of the rest of H.264, and all of the other the standards necessary for the operating system, but also all standards necessary for the entire computer.

not important to Microsoft's H.264-compliant products" (FFCL ¶ 459) or even to Motorola's parent company, Google (FFCL ¶ 264)—the aggregate royalty burden suggested by Motorola's demands is even more unreasonable. If minimal contributions and outdated, unimportant aspects of the standard demand 2.25% of the end-product price, others claiming to hold more valuable patents would likely demand significantly more.¹⁰

Second, Motorola was engaged in hold up: Its royalty demands exceeded the value of its patented technology by such a margin that no rational company could accept them; it accompanied those demands with 20-day ultimatums; and backed them up by pursuing lawsuits and injunctions around the world. (FFCL ¶¶ 55–56.) The demands Motorola made in its October 2010 letters were merely a prelude to the barrage of lawsuits launched against Microsoft, consistent with a strategy of hold up, not with an attempt to enter into a RAND license. [REDACTED]

[REDACTED] See Wion Decl. Ex. 7 (Dailey ITC Tr.) 2495:23–2497:6; Wion Decl. Ex. 2 (Blasius 30(b)(6) Dep.) 49:2–50:5; Wion Decl. Ex. 11 (Google/MMI European Commission submission) § 4.1 [REDACTED] Motorola cannot claim it only filed those actions as a necessary, but unexpected response to Microsoft having filed this suit, because Motorola filed the 699 and 700 Actions on November 10, 2010—the day after Microsoft filed here—and its ITC action followed only 12 days later. [REDACTED]

[REDACTED] Wion Decl. Ex. 7 (Dailey ITC Tr.) at 2498:6–24.¹¹

¹⁰ Stacking concerns are particularly heightened here, because products on which Motorola demanded royalties need to comply with many other standards besides H.264 and 802.11. (FFCL ¶ 63.)

¹¹ Entries in Motorola's privilege log for October 2010, [REDACTED] See Wion Decl. Ex. 3 (Motorola's Second Supplemental Log of Withheld Documents) [REDACTED]

Motorola's immediate pursuit of injunctions confirms that its letters were only the first step of an attempt to hold up Microsoft. If granted, the injunctions Motorola pursued would have left Microsoft with a choice between pulling its standard-compliant products out of the U.S. and German markets, or giving Motorola whatever it demanded in exchange for a license to Motorola's 802.11 and H.264 patents. (*See* Dkt. No. 318 at 23–24.) As the Court has recognized, injunctions are key leverage in forcing standard implementers to accept non-RAND terms: “[T]he threat of an injunction looming over the negotiation table . . . fundamentally places [the party seeking a RAND license] at a disadvantage,” and may lead to distorted, harmful licensing arrangements that “may not easily be undone.” (Dkt. No. 318 at 24.) The European Commission, investigating potential antitrust abuses by Motorola in its pursuit of injunctions, reached the same conclusion: “The Commission is concerned that the threat of injunctions can distort licensing negotiations and lead to licensing terms that the licensee of the SEP would not have accepted absent this threat.” Wion Decl. Ex. 12 at MS-MOTO_1823_00005258268.

Motorola's economic expert Leonard testified that if a patent owner uses an injunction “to try to get hold-up value,” that would be “potentially problematic” in light of the RAND licensing commitment and the duty of good faith and fair dealing. Wion Decl. Ex. 5 (Leonard Dep.) 136:9–137:19. Leonard defines RAND as “commensurate with the economic value of the patented technology to the licensee relative to the next best alternative technology prior to the standard being set,” and defines hold-up value as value above RAND that “derives simply from the patented technology being incorporated into the standard.” *Id.* at 16:3–17:5. At the November 2012 trial, Motorola still sought a 2.25% royalty that the Court has since found included “an improper attempt by Motorola to capture the value of the H.264 Standard itself as

opposed to a royalty on the actual economic value of Motorola's patented technology." (FFCL ¶ 269.) Motorola continued to seek an exclusion order on its H.264 standard-essential patents in the ITC as late as January 2013. *See* Wion Decl. Ex. 13 (ITC Mot. to Terminate) at 1. Under the view of its own expert, Motorola was trying to get hold-up value using injunctions.

Both Motorola's conduct in sending the October 21, 2010 and October 29, 2010 letters, and Motorola's conduct in subsequently filing actions and seeking injunctions in U.S. district court, the ITC, and Germany frustrated the purposes of the RAND licensing commitment. Accordingly, Microsoft is entitled to summary judgment that each instance of conduct breached Motorola's duty of good faith and fair dealing.

C. Microsoft Is Entitled To Summary Judgment On Motorola's Third, Fourth, Fifth, Seventh, Eighth, and Ninth Affirmative Defenses And Second Counterclaim.

Motorola's Answer to Microsoft's Amended Complaint includes, as an affirmative defense, the claim that:

Microsoft's First and Second Causes of Action are barred because, by failing to apply for a RAND license and to negotiate the terms of a RAND license and instead filing the present action, Microsoft breached the contract to which it claims to be a third party beneficiary, and failed to satisfy the conditions precedent to any obligations that it was owed as an alleged third party beneficiary, and thereby forfeited all benefits of any purported RAND statement made by the Defendants.

(Dkt. No. 68, Fourth Affirmative Defense at 13–14.) Motorola subsequently explained in interrogatory responses that its Third, Fifth, Seventh, Eighth, and Ninth Affirmative Defenses are all based on the same theory that Microsoft should have negotiated first before filing this suit. The basis of Motorola's Third Affirmative Defense ("Ripeness") is that Microsoft's claims "are not ripe for adjudication because Microsoft has repudiated, or failed to satisfy any condition precedent, any right to a RAND license pursuant to Motorola's RAND obligations." Wion Decl. Ex. 14 (Motorola Interrogatory Responses) at 47–48. The basis of Motorola's Fifth Affirmative Defense ("Waiver") is that "because Microsoft has neither applied for a

1 license, nor engaged in good-faith negotiations for a license, Microsoft has repudiated and
 2 waived any benefit that it otherwise would have enjoyed based on Motorola's RAND
 3 assurances." *Id.* at 49. The basis of Motorola's Seventh Affirmative Defense ("Unclean
 4 Hands") is that Microsoft sued "Motorola for breach of contract, rather than negotiating the
 5 terms of a RAND license in good faith, [which] demonstrate[s] Microsoft's lack of good faith."
 6 *Id.* at 51. The basis of Motorola's Eighth Affirmative Defense ("Failure to Mitigate") is that
 7 "Microsoft was required to mitigate its purported damages by applying for a RAND license
 8 from Motorola and by negotiating the terms of such a license in a bilateral, good-faith
 9 manner." *Id.* at 52–53. Finally, the basis of Motorola's Ninth Affirmative Defense ("Failure
 10 to Satisfy a Condition Precedent") is that "Microsoft failed to satisfy conditions precedent to
 11 any duty arising on the part of Motorola – namely, application, and a willingness to negotiate
 12 in good faith, for a RAND license." *Id.* at 55–56.

13 Motorola also advanced a counterclaim predicated on the same theories. (*See id.* at 15–
 14 33.) Motorola alleged Microsoft had repudiated its rights to RAND licenses by implementing
 15 standard-compliant products without first applying for a license. (*See id.* at Counterclaim
 16 ¶¶ 51, 56.) Motorola also alleged that Microsoft's filing of this suit was a "refusal to negotiate
 17 the terms of a RAND license in response" to Motorola's letters, constituting a further
 18 repudiation of Microsoft's rights to RAND licenses. (*Id.* at Counterclaim ¶¶ 53, 58.) Motorola
 19 alleged that it filed its injunctive actions "in light of Microsoft's refusal to apply for a RAND
 20 license," Microsoft's "refusal to negotiate a RAND license," and Microsoft's "bad faith filing
 21 of suit in the present action." (*Id.* at Counterclaim ¶ 60.)

22 On March 30, 2012, Motorola moved for summary judgment on these theories:

23 There is no genuine dispute that at the time Motorola sent its October 2010 offer
 24 letters to Microsoft, Microsoft had not applied for a RAND license to
 25 Motorola's 802.11 and H.264 portfolios. *Because the SSO policies require an*
 26 *applicant to seek a license from a licensor, Motorola seeks summary judgment*
that those October 2010 offer letters cannot form the basis of a breach of
contract or promissory estoppel claim. In addition, because Microsoft refused

1 *to negotiate in good faith with Motorola, but instead immediately brought this*
 2 *action, Motorola is entitled to summary judgment that it had no further*
 3 *contractual duty to negotiate a RAND license with Microsoft. Finally, this*
 4 *Court should declare that Microsoft, by failing to satisfy the conditions of*
 5 *applying for and negotiating for a RAND license, and instead commencing this*
 6 *lawsuit, repudiated and forfeited any benefit it might otherwise have had under*
 7 *Motorola’s RAND assurances, and Motorola is thereby relieved of any further*
 8 *obligation to negotiate a license with Microsoft on RAND terms.*

9 (Dkt. No. 231 at 2 (emphasis added); *see id.* at 12–24.) Motorola’s briefs set out the argument
 10 that Microsoft’s filing of this suit breached the duty of good faith and fair dealing. *See* Dkt.
 11 No. 290 at 1 (“The undisputed facts establish unequivocally that Microsoft did not act in good
 12 faith.”), 3 (“Under Washington law, every contract involves an implied duty of good faith and
 13 fair dealing that obligates the parties ‘to cooperate with each other so that each may obtain the
 14 full benefit of performance.’ . . . This obligation to act in good faith extends not just to
 15 Motorola, but to Microsoft, as well.”).

16 In June 2012, the Court denied Motorola’s motion for summary judgment with
 17 prejudice, rejecting all of the arguments advanced. (*See* Dkt. No. 335 at 16–21, 28.)
 18 Nevertheless, Motorola apparently intends to press these arguments at trial. As set forth in
 19 Microsoft’s contemporaneously-filed Rule 702 motion, Motorola’s experts offer opinions
 20 inconsistent with the Court’s June 2012 order. Motorola’s July 1 brief advances the same
 21 “failure to cooperate” argument Motorola pressed in its summary judgment briefing when it
 22 argued Microsoft “failed to cooperate” by filing this suit. (*See* Dkt. No. 716 at 8–9.)
 23 Motorola’s July 1 brief also argues that in some situations the “filing of a contract lawsuit”
 24 might breach the duty of good faith and fair dealing (*see* Dkt. No. 716 at 6–7)—further
 25 suggesting that Motorola still plans to argue it is absolved of any RAND obligations because
 26 Microsoft filed this suit. Motorola presented these claims and arguments at the summary
 judgment stage in March 2012, they have been rejected with prejudice, and they should play no
 further part in this case.

V. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court grant partial summary judgment of breach of contract in Microsoft's favor, and that the Court grant summary judgment in Microsoft's favor as to Motorola's Third, Fourth, Fifth, Seventh, Eighth, and Ninth Affirmative Defenses and Second Counterclaim.

DATED this 3rd day of July, 2013.

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I, Tim Murphy, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 3rd day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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